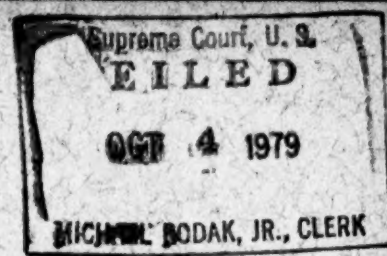


No. 79-236



In the Supreme Court of the United States

OCTOBER TERM, 1979

PLACID OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEMPORARY EMERGENCY COURT OF
APPEALS OF THE UNITED STATES**

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Acting Assistant Attorney General

LEONARD SCHAITMAN
DINA R. LASSOW
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-236

PLACID OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEMPORARY EMERGENCY COURT OF
APPEALS OF THE UNITED STATES*

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-131) is reported at 600 F. 2d 813. The opinion of the district court (Pet. App. A-104 to A-129) is reported at 465 F. Supp. 1199. The final decision of the Federal Energy Administration (Pet. App. A-90 to A-98) is reported at 4 FEA Energy Management (CCH) para. 80,534 (1976 Decisions).

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1979. The petition for a writ of certiorari was filed on Monday, August 13, 1979. The jurisdiction of this Court is invoked under 15 U.S.C. 754(a)(1), incorporating 12 U.S.C. 1904 note.

QUESTIONS PRESENTED

1. Whether the Federal Energy Administration properly denied petitioner's application for an exception from the agency's mandatory petroleum allocation regulations.
2. Whether the district court correctly found that petitioner's constitutional challenge to FEA's "December 1 Rule" (10 C.F.R. 211.63) was not substantial.
3. Whether the district court correctly granted the agency's motion for summary judgment as to the statutory validity of the "December 1 Rule."

STATEMENT

In January 1974, the Federal Energy Administration ("FEA")¹ promulgated a regulation (known as the "December 1 Rule," see 10 C.F.R. 211.63) pursuant to its authority under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* ("EPAA"). This regulation provided that all supplier/purchaser relationships under contracts for sales, purchases or exchanges of domestic crude oil in effect on December 1, 1973, shall remain in effect for the duration of FEA's allocation program under the EPAA (Pet. App. A-105).²

Petitioner is an independent producer of crude oil and natural gas. On December 30, 1974, through a wholly-owned subsidiary, it purchased a refinery located at Port Allen, Louisiana. At the time this purchase was made, all

¹Pursuant to the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, and Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977), the Department of Energy has succeeded to the FEA's functions and responsibilities for the administration of mandatory petroleum pricing and allocation regulations.

²The rule was later amended and now refers to contracts in effect on January 1, 1976. 10 C.F.R. 211.63 (see Pet. App. A-105).

of petitioner's crude oil production was committed to other companies, pursuant to the December 1 Rule. These commitments prevented petitioner from supplying crude oil to its Port Allen refinery and required the refinery to purchase crude oil from other sources (Pet. App. A-104 to A-106).

In December 1975, petitioner applied to FEA for an exception from the provisions of the December 1 Rule. Petitioner claimed that its inability to use its own crude oil production in the Port Allen refinery resulted in serious hardship and gross inequity. In April 1976, FEA concluded that exception relief was not warranted on either ground and denied the application (Pet. App. A-73 to A-89). Although FEA acknowledged that exception relief had previously been granted to small refiners with new or expanded refinery capacity who had relied on a particular source of crude oil, the agency found after a detailed analysis that petitioner's factual situation did not meet the criteria for relief established in these earlier decisions (*id.* at A-73 to A-79). The order was upheld on administrative appeal (*id.* at A-90 to A-98).³

Petitioner then instituted this action in the United States District Court for the Northern District of Texas to challenge FEA's denial of exception relief. Petitioner also alleged that the December 1 Rule was unconstitutional and exceeded the agency's statutory authority.

The district court upheld FEA's denial of relief (Pet. App. A-104 to A-130). The court held that the agency had not acted arbitrarily or capriciously, that it had reasonably distinguished the prior rulings on which petitioner relied, and that its decision was supported by

³Petitioner also filed a request for reconsideration of the appeal, but FEA determined that no need for reconsideration of its decision had been demonstrated (Pet. App. A-99 to A-103).

substantial evidence (*id.* at A-109 to A-126). The court also concluded that petitioner's claim that the December 1 Rule constituted an unconstitutional taking of property without just compensation was foreclosed by decisions of the Temporary Emergency Court of Appeals and thus did not constitute a substantial constitutional issue warranting certification to TECA pursuant to Section 211(c) of the Economic Stabilization Act, 12 U.S.C. 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. 754(a)(1) (Pet. App. A-126 to A-128). Finally, the court rejected petitioner's claim that the December 1 Rule was in excess of the agency's statutory authority (*id.* at A-128 to A-129).

The court of appeals affirmed per curiam on the basis of "the well-reasoned opinion of" the district court (Pet. App. A-131).

ARGUMENT

1. Petitioner claims (Pet. 13-21) that the district court applied an incorrect standard of review of FEA's decision because the court cited, among other things, a statement in *Basin, Inc. v. FEA*, 552 F. 2d 931, 934 (T.E.C.A. 1977), that "the [FEA] regulation should have been upheld if it had any rational basis to support it" (Pet. App. A-109). Petitioner argues that the "any rational basis" test is an improper standard of review in the context of an agency decision that is alleged to conflict with prior agency decisions.

Petitioner's attempt to find an error of substance in the district court's choice of words is unpersuasive. First, the district court quoted and applied the statutory standard of review set forth in 12 U.S.C. 1904 note, which provides in pertinent part that "no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the

agency's authority, or is based on findings which are not supported by substantial evidence." See Pet. App. A-109. The district court then proceeded to analyze in detail the distinctions that FEA had found between this case and the prior cases relied on by petitioner (*id.* at A-112 to A-126), and it expressly concluded that those distinctions were "neither arbitrary nor irrational nor unsupported by substantial evidence" (*id.* at A-126; see also *id.* at A-121, A-123).

As petitioner notes, the district court also cited a number of decisions of the Temporary Emergency Court of Appeals describing the standard of review of FEA orders denying exception relief in terms of whether the agency's decision had a "rational basis." But those decisions merely reflect the general and correct proposition that

[t]he necessity of making "rough accommodations" to implement and effectively administer the "complex program necessary to deal with the petroleum industry" has warranted "special attention" by this court to the rule of deference when it is faced with reviewing agency action which grants or denies exception relief to parties based on a case-by-case determination of the effect of the application of agency regulations to that party.

Powerine Oil Co. v. FEA, 536 F. 2d 378, 385-386 (T.E.C.A. 1976).⁴

2. Section 5(a) of the EPAA provides that if a district court, in any action commenced under that statute,

⁴Petitioner does not directly challenge the district court's conclusion that FEA rationally distinguished its prior rulings. The court's conclusion is plainly correct for the reasons stated in its thorough opinion (Pet. App. A-113 to A-126).

determines that a "substantial constitutional issue" exists, it must certify that issue to the Temporary Emergency Court of Appeals. Petitioner claims (Pet. 21-23) that the district court erred in finding insubstantial its claim that the December 1 Rule is an unconstitutional taking of property without just compensation.

The district court correctly held that petitioner's claim was not substantial because it had been squarely rejected by previous decisions of TECA. In *Condor Operating Co. v. Sawhill*, 514 F. 2d 351, cert. denied, 421 U.S. 976 (1975), and *Basin, Inc. v. FEA*, 552 F. 2d 931 (1977), the court of appeals held that the December 1 Rule does not constitute an unconstitutional taking of property, but rather is a temporary and permissible suspension of usual property prerogatives to meet a national emergency. Petitioner argues (Pet. 22-23) that the court's reasoning in *Condor* is no longer applicable because the creation of the Department of Energy⁵ shows that the December 1 Rule is no longer a temporary measure but instead is "a long continuing response to chronic energy problems." *Condor Operating Co. v. Sawhill*, *supra*, 514 F. 2d at 362. Petitioner's argument overlooks the fact that under Section 18 of the EPAA, 15 U.S.C. 760g, the President's authority to issue petroleum price and allocation regulations will terminate on September 30, 1981. The establishment of DOE in October 1977 may have made the agency administering these regulations more permanent, but it did not change the temporary nature of the regulations themselves.⁶

⁵See note 1, *supra*.

⁶Petitioner's objection, which is only to the failure of the district court to certify its constitutional claim to the court of appeals, is insubstantial for an additional reason: even if the district court erred in failing to certify, petitioner had a full opportunity to present its claim to the court of appeals and did so. That court rejected the claim on the merits.

3. In *Condor* and *Basin*, the court of appeals upheld the statutory validity, as well as the constitutionality, of the December 1 Rule. The court discussed in detail FEA's reasons for issuing the Rule and the Rule's relationship to the nine statutory objectives of the EPAA. Nevertheless, although *Basin* was decided as recently as March 1977, petitioner contends (Pet. 23-25) that the district court erred in rejecting its statutory challenge to the Rule without giving it the opportunity to introduce evidence concerning changed circumstances in the petroleum industry that have allegedly eliminated the statutory justification for the rule.

Although the district court's reference (Pet. App. A-129) to petitioner's "negligible" chances of success on this point does not mirror precisely the standard for summary judgment in Fed. R. Civ. P. 56, the court's discussion of the claim, read in context, indicates that it summarily denied the claim on proper grounds. The district court recognized the limited role of the courts in reviewing FEA's regulations and the fact that "the December 1 Rule has been upheld [by TECA] against attacks virtually identical to that made here" (Pet. App. A-129). As the court of appeals stated in *Basin* (552 F. 2d at 938):

In upholding Section 211.63, this Court expresses no opinion as to the wisdom or efficacy of the questioned regulation. The judiciary does not comprise a higher administrative board charged with determining what agency action would be in the best interest of the nation. In cases such as this one, once it is determined that a contested regulation is a rational attempt to effectuate the congressional policy, the inquiry must be closed.

Hence, the district court correctly found, and the court of appeals correctly affirmed its finding, that no material facts were in dispute because TECA had already held that the December 1 Rule is a rational and statutorily authorized implementation of congressional policy in the EPAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.

Solicitor General

ALICE DANIEL

Acting Assistant Attorney General

LEONARD SCHAITMAN

DINA R. LASSOW

Attorneys

OCTOBER 1979